2008

Why is International Law Binding?

Anthony D'Amato
Northwestern University School of Law, a-damato@law.northwestern.edu

WHY IS INTERNATIONAL LAW BINDING?

Anthony D'Amato

Although international law has reigned over all the states for four millennia, it still has not been outfitted with a coherent theory. Like quantum mechanics that physicists know how to work with but admit they do not understand, legal practitioners and scholars learn how but not why international law remains the only universal language specifying the rights and obligations of states. The answer to the question where international law comes from seems simple enough: it derives from the practices of states. But how does what states do become that which they must do? How can empirical evidence of state behavior generate norms? Is it just Hume's naturalistic fallacy writ large? Suppose states routinely engage in torture? Wouldn't that practice then become imperative? Does "soft law" help us distinguish between practices that are law-creating

and those that violate the law? Does evolutionary theory play a part? Should we think of international law not as a set of background rules but as an active player in the game of international relations? Can an active player insist upon its own observance?

This Chapter is a set of inferences to the best explanation of the bindingness of international law. It undoubtedly falls short of *explaining* international law—a task cheerfully vouchsafed to future researchers. The inferences here are presented as a set of numbered propositions called an apory.[1]

I. International Rules Are Derived from Dispute Resolution

(1) Conditions favorable to the rise of international law include the existence of several self-contained political entities ("states") each claiming exclusive sovereignty over its own territory and respecting the internal sovereignty of the other states.

(2) When in their foreign relations the states begin to interact and sometimes clash, the rules they eventually settle upon to resolve their controversies form a kind of "common law" of dispute resolution that consists of precedents for averting or handling future disputes.

(3) States often employ a treaty that sets forth agreed-upon rules for the avoidance or resolution of anticipated disputes.

[1] An apory is explained in *See* Nicholas Rescher, Paradoxes: Their Roots, Range, and Resolution 3-20 (2001).

(4) We will call the aggregate of states the international legal system ("ILS"). The ILS acting over time in its own self-interest embraces rules that avoid or peaceably settle disputes among the states, while discouraging the alleged rules that would lead to greater friction or an escalation of the inter-state disputes.

(5) The ILS attaches the label "international law" to rules that reduce disruption among individual states or to rules that restore international equilibrium.

This foregoing account does not explain the strong normative force of rules generated by the ILS. So far they only amount to "lessons from history"; that is, suggestions (formulated as rules) for friendly (or at least efficient) conflict resolution. What is required for a set of rules to have a strong normative force is recognition that they constitute binding law.

This normative force does not arise simply from the practice of states, for it would be a Humean fallacy to derive norms from facts. Yet the practice of states is all we have to work with. This Chapter will suggest that there is a way of looking at the practice of states so as to infer a universal norm (the norm that the legal system ought to survive).

There is no world legislature superior to the states that controls the content of international law. One reason there is no such body is the fear that it would favor some states or coalitions (the most powerful?) and disfavor others. Every state of the 192 states in the world, as of the latest count, regards itself as the juridical equal of every other state. There is nothing material outside the 192 states that constrains their behavior. Law in particular has no existence outside the 192 states. Thus we find, and expect to find, that

(6) All states are equal under international law. (Otherwise the weaker states would shun and denounce it.)

(7) All states accept the principle of reciprocity. (Reciprocity is either entailed by equality or pragmatically inseparable from it.)

(8) International law itself must be justified, or at least justifiable, in order for states to be inclined to obey it.

Any search for justifications will quickly turn up two that are at the top of every state's list—one negative and one positive.[2] The negative justification is the states' mutual interest in the avoidance of war. The positive justification is the maximization of their joint welfare by facilitating trade.

(9) Every war is a net loss to the aggregate of states.

This assertion is as close as one can get in the empirical world to an *a priori* principle. At the outset of any war between two (or more) states A and B, their combined assets total some value k:

(9a) *Ex ante* war: A + B = k.

When eventually there is peace, the states' combined assets total:

[2] There are many other justificatory reasons for obeying international law. See John Tasioulas, The Legitimacy of International Law, supra Chap. ___.

(9b) E*x post* war: A + B = k – d

"d" is the deadweight loss of the war. It includes persons killed or wounded on either side, destruction of buildings and cultural monuments, cutting the power grid and water supply system, and all the myriad forms of destruction and disruption. Since both k and d are always positive numbers, then any state on the average can calculate that war is always a bad investment. This calculation does not mean, of course, that states never go to war. A state may rationally decide that it has more to gain in the short run by (its likelihood of) winning the war than it stands to lose in the long run because of (its share of) deadweight losses.

Incidentally, the formula holds even if one state completely absorbs another:

(9c) *Ex ante* war: A + B = k

(9d) *Ex post* war: A = k - d . (State B has disappeared.)

On the positive side of the ledger, every state has an interest in sharing the surplus value that results from the free exchange of goods and services:

(10) Every trade is a net gain to the aggregate of states. Any exchange of goods or services from the person who values them less to the person who values them more constitutes a net gain in the welfare of both sides.[3]

[3] The Pareto optimality of international trade is usually called the Doctrine of Comparative Advantage, attributable to David Ricardo and to a lesser extent Adam Smith. However, Ludwig von Mises has said that

(10a) *Ex ante* trade: A + B = k.

(10b) *Ex post* trade: A + B = k + s ("s" stands for welfare surplus)

We have now arrived at, *en passant* as it were, what may be regarded as the most important observation one might make about the origin of international law: that it owes its creation and upkeep to the aggregate of states rather than to individual states. International law flows from all the states taken together, and not from the sum of preferences of individual states.[4] There is no higher source of international law than the aggregate of states. Therefore the aggregate cannot act illegally:

(11) If an individual state acts contrary to a rule of international law, its behavior is deemed (by the aggregate of states) to be lawless .

(12) If all the states in the world suddenly act contrary to a rule of international law, their behavior will be deemed by themselves as lawful. In effect the aggregate of states will have changed the rule by unopposed consensus.[5]

Ricardo was well aware that his Doctrine of Comparative Advantage was just an international version of the universal law of division of labor. Ludwig von Mises, Human Action 159 (1949).

[4] This point coincides with recent scientific findings of emergence. See Steven Johnson, Emergence: The Connected Lives of Ants, Bees, Cities, and Software (2002)..

[5] For further discussion of rule-change by consensus, see Anthony D'Amato, On Consensus, 8 Canadian Y.B.I.L. 104 (1970).

II. Deriving an Ought from an Is

The argument so far may be summarized as follows. In order for international law to be more than an existential fact, its content must serve (promote, facilitate) the interests of the aggregate of states. The two primary interests of the aggregate of states are the avoidance of war among states and the facilitation of trade among states. Whether a given alleged rule of international law is actually a valid rule of international law depends on whether its content promotes either or both of these primary interests of the aggregate of states. Thus the normative force of law derives from its factual coherence with the two primary interests. Since war and trade are both facts, we seem to have produced a norm from a fact.

But not quite. We are assuming that states desire to be rational—that they want to avoid war and promote trade because of the gains in security and welfare that will accrue to them. But suppose states behave randomly. Were Nero, Napoleon, and Hitler rational leaders? (That is, other than in their own minds.) More fundamentally, how is it warranted to attribute any emotion to a state? A state is an artificial concept; the words "rational" and "irrational" do not apply to territory.

1. Soft Law

An inventive way to deal with the fact/norm problem is to attack it in reverse. Instead of starting with state practice, start with norms. These norms can then—somehow—inform or even shape what states do. Of all the sciences and disciplines, law is the most ideally suited to proceed from norms to facts. The norms can cut a swath through the most stubborn facts. For if the facts prove recalcitrant, they can always be declared illegal on the ground of failure to conform to the norms. Thus we are left with only conforming facts. By beginning with a basket of norms, we can say that in every case the facts either meet up with friendly norms and are accepted or they encounter unfriendly norms and are banished from the evidentiary pool. Scientists would surely appreciate such a tidy world where every piece of factual evidence either supports the theory (norm) or else doesn't count.[6]

Soft law, as the term is used in international law, can roughly be described as an incorporal rule. It is rule without sanction; mind without body; essence without being; precatory but not obligatory. Soft law has especial appeal to writers who claim that international law is unenforceable. In the earlier chapter by Samantha Besson, soft law is often treated as if there were no hard law around to compete with it. This approach forces us to come to grips with what the world would look like if all its law were soft.

The main problem in such a world is that it would be overcrowded with soft law. Unless there were a mechanism for accepting some norms and rejecting others, the world would be beset with contradictory norms. For example, in the left-hand column below, various norms about women

[6] In such a world no theory could ever be falsified.

are paraphrased from the Convention on the Elimination of All Forms of Discrimination Against Women.[7] The right-hand column contains norms about women that have been expressed from time to time by spokespersons for the Muslim religion:

	Alleged norms about women
1. right to hold public office.	1. unfit for public office
2. right to acquire, change, or retain their nationality.	2. has husband's nationality
3 access to higher education.	3. place is in the home
4. right to work	4. housework only
5. equality with men before the law	5. testimony valued at half that of a man
6. right freely to choose a spouse	6. parents' right to choose her spouse

If there is any norm that does not have an opposite, one can be invented. In short, norms are too easily contradicted to play a prominent role in international law-formation.

2. Filters

Suppose, however, that a filter could be devised that would block out undesirable or opposite norms. Would the resulting shower of benign norms upon the Earth lead to legal improvements and legal reform?

[7] Dec. 18, 1979, 19 I.L.M. 33 (1980).

The soft-law advocate's ideal filter would be an international court. This actually happened just once in the idiosyncratic *Nicaragua* ruling of the International Court of Justice. The judges, acting without benefit of adversary argument (the United states defaulted) and without law clerks, wrote an opinion that collected willy-nilly all extant non-intervention norms, dubbed them customary law, and held that the United States violated the law by intervening militarily in Nicaragua.[8] Or to put the matter in the terms of the present Chapter, the ICJ filtered out all the contrary norms that permit intervention, such as using force to stop genocide, to attack terrorist camps when the host country refuses to act, to rescue nationals that are being held hostage, to restore a democratic Presidency that has been ousted by a fascist military coup, or to strike against a nuclear missile facility nearing completion in a nation run by an unstable tyrant. John Tasioulas has made the *Nicaragua* case the centerpiece of a noteworthy defense of soft law.[9] By aggregating all the non-intervention norms, he removes all the nuances of the customary law of projections of force across boundaries, just as candidates for national office reduce complex policies to one-sentence sound bites. He concludes that the resulting rule prohibiting all interventions is a significant step toward his world-order values. He does not seem to notice how deeply reactionary such a rule would be. For example, the new rule would make it illegal for nation A to intervene forcefully in nation B to stop the government of B's genocide against a minority group of B's nationals within B's territory. The great human-rights breakthrough of the post-World War II period that extended international protection to *individuals against their own governments* for egregious human-rights violations (genocide, torture, slavery) would be reversed on the basis of one aberrant case that selected just the non-intervention norms and said they added up to a general international prohibition against forcible intervention. Inasmuch as Tasioulas agrees with Besson that the goals of soft law, and indeed the motivation for soft law, include

[8] Specification of these criticisms may be found in Anthony D'Amato, Trashing Customary International Law, 81 *American JIL* 101 (1987).
[9] John Tasioulas, "In Defence of Relative Normativity: Communitarian Values and the *Nicaragua* Case," 16 *Oxford JLS* 85 (1996).

justice, morality, human dignity, well-being, co-existence, cooperation, pluralism, and democracy, the reader might ask how *any* of these goals would be furthered by looking the other way while a government proceeds in a campaign of genocide against groups of persons within its own territory. A barrier to external intervention in such a case is equivalent to letting the genocide proceed unabated.

3. Democratic Values

Perhaps the only remaining way to avoid perverse or unintended consequences like the genocide example would be to construct the filter out of the very goals that advocates of soft law wish to achieve. This might sound circular: let the Ends cause the Means so that the Means may cause the Ends. However, unlike the cart-before-the-horse aphorism, a convincing justification by Charles Taylor for inverting the Means-Ends relationship points to its utility here.[10] Taylor argues that whenever a sentient animal engages in a purposive activity, the purpose causes the activity. For example, a person who desires to go to a restaurant a block away will walk in that direction. It is the image or picture of the restaurant in her mind that causes her to move her body toward the restaurant. Thus in human action the goal comes before the means.

Allen Buchanan, a contributor to the present book, wrote an earlier essay proposing that a filter (he did not use that term) could be constructed that would only allow passage to norms that are conducive to achieving justice, morality, and democracy.[11] Constructing such a filter would surely be a gargantuan task; the filter would have to pre-identify norms that have a built-in tendency to promote justice and democracy. But on the theoretical level, one might agree with Buchanan that the implementation problem can be postponed if the foundations of the theory are

[10] See Charles Taylor, Explanation of Behaviour (1964).
[11] Allen Buchanan, "From Nuremberg to Kosovo: The Morality of Illegal International Law Reform," 111 *Ethics* 673 (2001).

solid, And we know, before the implementation stage, that certain basic rules of traditional international law conflict with the justice-oriented and democracy-oriented rules of soft law. Thus at the theoretical stage those conflicts must be addressed.

The most basic of those traditional rules of customary international law is that states are equal before the law. However, Buchanan straightforwardly acknowledges that a democratic and just world order is incompatible with the legal equality of states. Legal equality operates as a shield for affluent states and undemocratic states to protect themselves from external interventions that could effectuate redistribution of wealth and assets. Thus the present international system of legal equality tolerates, legitimizes, and stabilizes extreme economic inequalities among individuals and among states.[12] Many states are lucky in having an abundance of mineral riches below their soil, others achieved their present wealth by past injustices. This unequal distribution of the world's resources, Buchanan charges, is *illegitimate.* Accordingly the have-not states arguably have a moral right under distributive justice to act *illegally* against the affluent states, stripping them of their claims of equality, reducing their legal status to one of subservience (especially in the case of non-democratic affluent states), and redistributing their wealth to the world at large. Such a wholesale rearrangement of the power and wealth relationships among states would be morally required as well as serving to bring the system closer to the ideal of the *rule of law.*

Although Buchanan does not necessarily favor illegal transformations to achieve democracy,[13] his vision would take a world revolution to achieve. Nations are not going to relinquish their wealth, resources, and power, just to satisfy an academic demonstration that justice requires it. People whose homes provide ample room for themselves are not going to willingly invite poorer families from other countries to move in with them and share their rooms and facilities. Perhaps

[12] Id. at 686.
[13] See Allen Buchanan, Justice, Liberty, and Self-Determination: Moral Foundations for International Law (2007).

they would do so at the point of a gun. But Buchanan expressly disavows violence. His logic has reduced him to encouraging legal reform to take place so long as it does so illegally.

4. Can International Law Be Value-Oriented?

A number of scholars today are joining writers like Allen Buchanan and Thomas Franck in arguing that democracy animates international law, breathing into the tired old legal categories a new *elan vital* that will elevate the prestige of international law and cause it to take the lead in actualizing human rights. However if these things must be done illegally, something is amiss. It is not that Buchanan has got his logic wrong. Rather, what goes wrong is the assumption that the terms "democracy" and "law" are separable. Democracy cannot act as a filter for the norms of soft law because it cannot be separated from those norms. Law is built in to the structure and mechanism of democracy so pervasively that democracy would look entirely different if extricated from law. It is like imagining ourselves to be living in a random universe: suppose a Soviet tank materializes itself in our living room, or a pitcher throws a baseball that en route turns into a football, or we are walking down a city street and glancing behind us we see stretching out in all directions the Sahara Desert. These are feeble attempts to imagine what living in a random world would be like. But we also cannot begin to imagine what democracy or justice would be like if all the legal relationships we take for granted were somehow removed.[14]

[14] Think of all the Hohfeldian categories that the law inflicts upon daily life: entitlements, duties, privileges, presumptions, liberties, powers, immunities, and claims. How could a complex social institution like democracy or justice be conceptualized without these types of relationships?

III. Evolution

The discussion of soft law has suggested that the difficulty of using posited norms to force coherence upon a random collection of facts does not work as a way of constructing a bridge between facts and values. Accordingly, we resume the previous thread; in sum:

(13) rationality → avoid war → promote trade → recognize international law as binding

But rationality does not work even if we could posit it as a basic hypothesis. Many wars have been started for reasons that seemed rational to the leaders even if the same reasons were later judged by historians to be irrational. Although wars are on the average net losers, in some individual cases they might be a rational strategy for one of the sides. Nor is this pessimism ameliorated if we skip over the political leaders and consider the state itself as the entity that decides on war or peace. For as we have seen there is simply no warrant for attributing a mental process like rationality to the configuration of mountains, lakes, valleys, and plains that constitutes a state.

However, a saving argument can be made. First, the aggregate of states constitutes a complex, self-regulating system. Second, this system functions as if to perpetuate itself through time. Third, to accomplish self-perpetuation, the system must invalidate rules that lead to war and accept rules that characterize the processes of successful dispute resolution.This process was sketchily introduced in proposition (1) above.

(14) States are sufficiently interconnected so as to constitute a system.

A system consists of elements such that a change in one produces a change in all. States create international law, are subject to it, and regard their national interests as implicated whenever other

states act so as to violate or appear to violate any rules of international law. It is handy though not necessary to call the aggregate of states a system. The international legal system ("ILS") is complex, self-referential, adaptive, and purposive; it seeks above all its own survival. Not all of these characteristics are important for present purposes, and in any event have been examined elsewhere.[15]

1. Two Strategies of Self-Perpetuation

From its beginnings in Mesopotamia in 2.000 B.C., the ILS has persisted to the present day[16] by two strategies that are common to most complex self-adaptive systems. First, it has fashioned the rules of international law to be overweighed in its own self-interest. The most obvious example is the grudging allowance for the rights of persons. States reluctantly accepted the idea of nationality, but insisted from the outset upon a one-way street: a nation was free to protect its nationals abroad, but a national abroad had no right of protection from his home state. If we view the ILS in evolutionary terms, it is clear that over time it has adjusted and modified its internal rules (the analogy to a plant or animal is a benign mutation) to protect itself against the forces of anarchy. Inasmuch as any war can escalate and spread out¸ anarchy is the greatest fear of the ILS. Prior to the twentieth century, the ILS was not strong enough to outlaw the resort to war, so it adopted rules that partially accommodated wars and partially constrained them. Peace treaties were favored even though signed under conditions of duress: a treaty that stopped the fighting was always considered by the ILS as preferable to continuation of the war no matter how onerous its terms. Similarly, by the time of the U.S. civil war, rules evolved for the humane treatment of prisoners of war. These rules were sharply disfavored by the generals and officers of the

[15] For more complete descriptions, see Anthony D'Amato, International Law as an Autopoietic System, pp.335-399, in Rüdiger Wolfrum & Volker Röben (eds.), Developments of International Law in Treaty Making, Berlin, Heidelberg, Springer, 2005); Anthony D'Amato, International Law as a Unitary System, in Handbook of International Law (Routledge, 2008).

[16] During the Roman Empire, proposition (1) did not hold; international law was suspended.

combatants, but the global interest of the ILS in reducing the deadweight damages of war gave international legal stature to the scholars who compiled these rules.

(15) One of the system's strategies for perpetuating itself is to adopt rules that reflect the aggregate interests of the states.

The ILS's second strategy for self-protection was to use the rules of international law to modify its environment. Birds build nests; beavers build dams; and people build houses. These activities interfere with the natural environment and greatly increase the entity's chances of survival. The ILS, of course, can only output rules; it has no material substance. But its rules can reconfigure the environment to make it more supportive of further rules (the more rules, the more business the ILS has to do). The first rule of international law—that a state's territory is defined by its boundaries—had a huge impact in paving the way for additional rules. Consider that the earliest Hittite kingdoms were dotted across Mesopotamia. As their populations grew, radial expansion led the outer edges of these kingdoms to run up against nearby kingdoms which were going through the same process of expansion. This led to countless wars for land rights between any given two kingdoms whose outer edges intersected with each other. The clashes abated greatly when borders were drawn or natural boundaries (rivers, valleys) were adopted. Then it was possible to create additional rules that reduced the incidence of warfare: rights of envoys, ambassadorial immunity, sanctity of treaties, effluvial rights when a river was a boundary, and so forth. The more subjects that are regulated by law, the more that the rule of law gains in normative power.[17]

(16) A second strategy for the system's self-perpetuation is to use rules to modify the environment so that it becomes increasingly amenable to the rule of law.

[17] As Oscar Wilde remarked, "Nothing succeeds like excess."

2. The Drive for Self-Perpetuation

The animal and plant species living today are those that have succeeded in the struggle for survival (over 99% of all Earth's species are extinct.) They have evolved body organs and sensory apparatus that, mutation upon mutation, have added to their fitness. Recent studies of evolution go further in suggesting that many of our deepest ideas and most innate drives are themselves the product of evolution. Their job is to coordinate all the body's powers and functions in the "fight or flight" response against natural predators and in the more routine practices of hiding and camouflage. Entities that develop a stronger mental drive for survival become those entities that are more likely to survive. Hence we can look upon an elephant's drive for survival and characterize it both as a fact about the elephant and a value for the elephant. If we turn our attention inward, we can plausibly say that the value we attach to survival is also a plain fact about ourselves and how we have evolved.

In 1973 two Chilean microbiologists Humberto Maturana and Francisco Varela introduced the idea of autopoiesis—a mechanical system sufficiently complex to regenerate and realize its own network of processes that produced them.[18] An autopoietic system will modify its internal mechanisms and modify its external environment if necessary to perpetuate itself over time. Maturana and Valera suggested that there was no visible difference between such a system and a living biological entity.

If we combine autopoiesis and the previous argument that the drive for survival is an evolved fitness characteristic, it is no additional stretch to conclude that the goal of the ILS is to survive. This is both a fact about the ILS and a value that the ILS has.

[18] Humberto Maturana & Francisco Verala, Autopoiesis and Cognition (1973).

3. The Value of Survival[19]

(17) The aggregate of states has an interest in the survival of the ILS because its survival means that the rule of law is working.

(18) The aggregate of states has an interest in the continued working of the rule of law because it creates and maintains conditions conducive to the avoidance of war (by setting up peaceful conflict-resolution rules and procedures) and to the stimulation of international trade.

(19) At any given point in time, the rules of international law exactly express the interests of the aggregate of states. See also proposition (4).

For all the preceding reasons, we can expect the ILS to use its influence on the A v. B controversy. We can expect the ILS to weigh in on the controversy according to the following hierarchical order:

1. Favor the side that would depart the least from existing international law.
2. Favor the side whose position would tend to reduce future complications.
3. Favor the side whose position would most likely stabilize the relations between A and B and those states that have a direct interest in their dispute.

[19] Compare the Chapter on natural law and survival in H.L.A. Hart, The Concept of Law (1961). His identification of survival as the paramount value is prescient and valuable for the present argument. However, his particular thesis that morality stems from survival is not followed here for two reasons. First, although an autopoietic system can strive to perpetuate itself, there is nothing necessarily "moral" about doing so. Second, if a person could save his own life by pressing a button that would destroy fifty million people including his family, Hart's thesis would suggest that the person would be doing the morally right thing by pressing the button.

These three propositions, which on the surface may seem new, are actually restatements of what the ILS has been set up to do all along. Since its own survival is coincident with the spread of international law and the maintenance of peaceful conditions on the ground, the ILS will proceed in the order above stated.

If the foregoing account of "Why is international law binding" has been helpful to the reader, the concept of the ILS has served its purpose and can be discarded.